



## **Calculated Risk: *Accepting Bids That Don't Add Up***

***Maystar General Contractors Inc. v. Corporation of the Town of Newmarket, 2009 ONCA 675***

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The contractor, Maystar, and its competitor Bondfield Construction Company ("Bondfield") were two of four pre-qualified bidders responding to the Town's call for tenders for the construction of a new recreational facility. On closing, the bids were publicly opened and it was revealed that Maystar was the lowest bidder with a total bid price (stipulated price plus GST) of \$35,524,000 and Bondfield was the second lowest bidder with \$34,874,960. Upon a more thorough review for compliance and accuracy, the Town found Bondfield's bid to have a discrepancy: the stipulated price and the GST did not add up to the total bid price that was announced previously at bid opening. It appears that Bondfield had transposed the stipulated price of \$33,000,528 to \$33,528,000 for the purposes of calculating the GST which resulted in a much higher total bid price than if the GST had correctly been calculated on the lower (and intended) stipulated price of \$33,000,528. Had Bondfield done its math correctly, it would have been the lowest bidder...which is the approach the Town took in correcting the mathematical error it perceived to have been made by Bondfield and, ultimately, awarding the contract to Bondfield. The Town took the further misstep of accepting and considering correspondence from Bondfield after bid closing that provided clarification on the pricing error. Not surprisingly, Maystar objected to the Town correcting the tender results and awarding the contract to Bondfield and commenced an action against the Town on grounds that the Town breached Contract A (the bid contract) with Maystar by accepting a non-compliant bid from Bondfield.

The Ontario Court of Appeal concurred with the lower court's decision that price is an essential element of a bid and, as in this case, price uncertainty in a bid cannot form the basis of a binding contractual relationship. In the court's view, Bondfield's error was not clear on its face - it was not simply a transcription error or a misplaced decimal. Rather, the pricing could not be discerned with any certainty whether the intended total bid price was the one stated in Bondfield's bid or the one calculated with the corrected GST. Also, under the terms of the tender the Town was prohibited from accepting amendments after the fact. By permitting the price uncertainty (and making corrections after-the-fact) the Town created an unfair advantage for Bondfield and in doing so breached an implied term of Contract A to treat all bids fairly and equally.

Local governments may be well intentioned to accept the lowest bid in the best interests of its citizens. However, as this case has shown, good faith will not provide a defence to a claim for breach of contract. For local governments, this case is a good reminder that they cannot undermine the tender process by accepting a bid with an uncertain price or to permit bidders to "explain" their errors in post-bid communications.